Supreme Court, U.S.
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No. 95-1054

In The

# Supreme Court of the United States

October Term, 1995

K. W. THOMPSON TOOL COMPANY, INC.,
a New Hampshire Corporation
dba Thompson Center Arms,

*Petitioner,*

v.

SUSAN R. PUMPHREY, individually and as
Guardian Ad Litem for TEDWARD O'RYAN SPARKS
and DAVID ERIK SPARKS,

*Respondents.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ADDITIONAL QUESTIONS PRESENTED

1. Was summary judgment entered by the district court in this case without advance notice to the petitioner or without affording the petitioner an opportunity to oppose the summary judgment prior to its entry?

2. Did the petitioner, by its conduct before the district court, invite the district court to decide the respondents' motion for summary judgment on the issue of fraud?

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## STATEMENT OF THE CASE

Respondents accept the petitioner's statement of the case so far as it goes. However, in view of the issue asserted by K. W. Thompson Tool Company, Inc. (henceforth called "Thompson"), in its Petition for Writ of Certiorari (henceforth called "the Petition"), it is necessary to analyze the circumstances of the summary judgment entered by the district court against Thompson to determine whether that judgment was really entered without notice to Thompson or without allowing Thompson an opportunity to be heard on the issues decided by the court.

The Complaint filed by Susan R. Pumphrey (henceforth called "Pumphrey") asked the district court to set aside the original judgment entered in 1982 on two grounds: (1) the judgment had been obtained by fraud on the court; and (2) without regard to the issue of fraud, the judgment had been obtained by means of unconscionable conduct on the part of Thompson. Prior to Pumphrey's motion for summary judgment, Thompson had never directly challenged the second of these theories, but it had challenged the claim of fraud on no fewer than four separate occasions: (1) in its motion to dismiss filed in December of 1990 (as supplemented by three further briefs filed in January, February and March of 1991); (2) a motion for reconsideration and two supporting briefs, both filed in July of 1991, (3) a motion to augment the record (filed in August of 1991 in connection with the motion for reconsideration); and (4) Thompson's own motion for summary judgment filed in March of 1992 (supplemented by a reply memorandum filed in April of

1992). In the course of these arguments, Thompson provided the district court with testimony from Edward Bartlett, Robert Gustafson and Kendrick French, the three employees involved in the fraud. Thus, contrary to Thompson's claim on page 16 of the Petition, the district court did in fact have before it the explanation by those employees of their activities and states of mind.

It is true, as stated on page 4 of the Petition, that Pumphrey originally based her motion for summary judgment upon the argument that she was entitled to relief on the grounds of unconscionability "irrespective of whether Thompson's conduct was technically fraud on the Court." It was, however, Thompson's response to this motion that determined the approach subsequently taken by Pumphrey and by the district court in their handling of the motion. Quoting directly from Thompson's Memorandum in Response to Plaintiff's Motion for Summary Judgment:

> "COMES NOW the defendant K. W. Thompson Tool Company, Inc., (hereinafter 'Thompson') by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this memorandum in response to plaintiffs' Motion for Summary Judgment filed June 5, 1992.
>
> Thompson submits that there is nothing new in plaintiffs' memorandum in support of its motion, because this issue has been discussed before. The appropriate place for plaintiffs to discuss the cases and the points they bring up in this memorandum would have been in response to Thompson's motion for summary judgment which stresses the argument that fraud on the

> court, rather than some other amorphous standard, is the only basis for setting aside the original judgment. Plaintiffs failed to argue these cases and points, and failed to refute Thompson's argument in its motion for summary judgment. They should not at this late hour be allowed to rewrite their response brief in the form of a summary judgment pleading."

Having identified the issues raised by Pumphrey in her motion with those raised by Thompson's prior arguments that no fraud had occurred, Thompson then embarked upon a nine page analysis of fact in which, among other points, it denied for the fifth time that any fraud had been committed or that the evidence presented at the original trial was false. Its argument set forth a new analysis of the record of the original trial proceeding to explain why its evidence in that proceeding had been truthful. It also included at least one express reference to deposition testimony of Thompson's employees concerning their activities and state of mind and indirect references to more of their deposition testimony by means of references to prior briefing, all of which belies Thompson's claim on page 16 of the Petition that the district court never heard that evidence. Thompson concluded its argument, literally in the last words in its response, with the remark that "if plaintiffs cannot prevail on their allegations that there was fraud on the court, they cannot set aside the 1982 judgment."

Pumphrey responded to Thompson's analysis by expanding her arguments to deal with the issue of fraud. In her reply memorandum, she stated:

> "Viewing the case at bar strictly as a claim for fraud, Plaintiffs' evidence shows that Bartlett, whether as a lawyer or a layman, participated in a conspiracy with Robert Gustafson and Ken French to conceal evidence, to give false testimony and to influence the testimony of its expert witnesses and those of the Plaintiffs by their actions. Under [*Chicago, Rock Island and Pacific Railway v. Callicotte*, 267 F. 799 (8th Cir. 1920)], this is sufficient, if proved, to warrant setting aside the judgment on account of fraud, regardless of Bartlett's status."

The point of this discussion is that Thompson itself changed the terms of Pumphrey's arguments to the trial court from "unconscionability" to "fraud." Pumphrey responded in kind. Thompson did not thereafter request more time or a further opportunity to rebut Pumphrey's new argument. In its opinion, the district court dealt with Pumphrey's motion for summary judgment in the precise terms that Thompson itself asserted that it should be considered.

It is perhaps for this reason that, in its motion to alter or amend filed on May 17, 1993, Thompson failed to identify one shred of evidence that the district court failed to consider in its Memorandum, Decision and Order of May 4, 1993, set forth in full on pages 21a through 68a of the Petition. In denying Thompson's motion, in an opinion dated February 11, 1994, set forth in full on pages 12a through 21a of the Petition, the district court made specific note of that fact. *See* the Petition, p. 14a. The Ninth Circuit made the same

observation in the course of its opinion deciding Thompson's appeal. *See* the Petition, p. 5a, n. 1.

## REASON FOR DENYING THE WRIT

### A. Considered In Context Of The Entire Record, This Case Does Not Present The Question Asserted By Thompson On Page i of the Petition.

In its motion to alter or amend filed with the district court on May 14, 1993, Thompson asserted that the district court's decision of May 4, 1993, was entered *sua sponte*. Pumphrey was content, at that time, to allow Thompson to make this assertion, because she was convinced that the assertion would lead nowhere. Given Thompson's lengthy arguments on the issue of fraud and its failure to identify any factual issue overlooked by the district court, Thompson had no chance of winning, in the Ninth Circuit, any argument based on the "*sua sponte*" issue. The later rulings by the district court and Ninth Circuit on that issue vindicated her judgment. *See* pp. 5a and 14a of the Petition.

Thompson now seeks to challenge that Ninth Circuit authority by suggesting that this Court should expressly adopt a different set of rules. Because Pumphrey does not know what rules Thompson will propose, she is no longer willing to assume for purposes of argument that the district court's judgment in this case was truly entered *sua sponte*.

As explained in the Statement of the Case, this is not a case in which the district court surprised Thompson with a theory that had not been fully briefed by that

party. Indeed, Thompson had raised the issue to the district court on five different occasions, including its own motion for summary judgment. Moreover, in responding to Pumphrey's motion for summary judgment, Thompson itself contended that Pumphrey was merely rearguing the issue of fraud and provided an additional nine pages of briefing to explain why no fraud had occurred. Thus, contrary to the thrust of the Petition, Thompson itself bridged the gap between Pumphrey 's original arguments regarding unconscionability and the question of fraud. The district court merely took Thompson at its word and decided the issue as Thompson presented it.

So far as Pumphrey is concerned, Thompson really complains here about its success in changing the focus of Pumphrey's motion from unconscionability to fraud. Thompson's assertion that it had no notice of the issues that the trial court was considering and no opportunity to brief them is flatly contradicted by the fact that Thompson itself defined those issues. The trial court merely decided them. If there was any error in doing so, Thompson invited the mistake. Invited error should not be grounds for granting certiorari.

**B. There Is No Conflict Among The Circuits On the Issue Really Presented By This Case.**

Pumphrey has reviewed each of the cases cited by Thompson in its Petition, and none presents a factual scenario like that of this case, in which (1) a party moved for summary judgment on one issue, (2) the party opposing that motion redefined the moving party's argument

to address a second issue and (3) the district court granted the summary judgment on the issue identified by the party opposing that motion. This case thus appears to be unique among reported decisions. *See* Section D of this argument. For that reason, it cannot be said that there is a conflict among the Courts of Appeal on the issue presented by this case.

Moreover, notwithstanding the fine catalogue of cases by Thompson in the Petition, any division among the Circuit Courts of Appeal on the issue of *sua sponte* summary judgments is more apparent than real. The emphasis of the words may differ. But, in the final analysis, the bottom-line issue is always whether the party who was the "victim" of the summary judgment that was entered *sua sponte* was prejudiced. If not, the summary judgment will be upheld; if so, it will not.

This is true even in the circuits which Thompson has described as requiring notice in each and every instance. For example, in *Moody v. Town of Weymouth*, 805 F.2d 30 (1st Cir. 1986), the First Circuit, which Thompson claims on page 8 of the Petition to have adopted a "bright-line" approach that always requires notice, upheld a *sua sponte* summary judgment because the "victim" could demonstrate no prejudice, concluding that this was more "sensible" than a pointless remand. With due respect to Thompson, this result does not evidence a bright-line approach.

In *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), the Third Circuit, another court claimed by Thompson on page 8 of

the Petition to uphold a "bright-line" rule, upheld a summary judgment entered *sua sponte* without notice on the grounds that the "victim" had waived the notice provisions of Rule 56 of the Federal Rules of Civil Procedure. As in *Moody*, this result is contrary to that of a bright-line approach.

Notwithstanding Thompson's description of the case, *United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731 at 735, n. 3 (4th Cir. 1989), expressly recognizes an exception to the notice requirements of Rule 56, citing *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866 (9th Cir. 1985), an implicit reference to the Ninth Circuit's position that the "victim" must have a full and fair opportunity to ventilate the relevant issues. It is evident that the Fourth Circuit has hardly adopted a bright-line approach.

Finally, in *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir. 1981), the Seventh Circuit stated that the failure to provide the notice required by Rule 56 did not necessarily mandate reversal. Once again, the result contradicts Thompson's claim of a bright-line approach.

These examples dispose of Thompson's claim that the First, Third, Fourth and Seventh Circuits have adopted the position that notice is always required. Since Thompson itself concedes, on pages 10 through 12 of the Petition, that the Second, Fifth, Sixth, Eighth and Eleventh Circuits approach the question of summary judgments granted *sua sponte* on a case-by-case basis, there is no point to analyzing authority from those courts. Pumphrey notes, in passing, that the Eleventh Circuit itself

conducted a similar survey of the courts in *Jones v. Automobile Ins. Co. of Hartford, Conn.*, 917 F.2d 1528 (11th Cir. 1990), concluding that most of the circuits did not strictly enforce the notice requirements of Rule 56. Thompson itself has noted that, in an opinion issued after *Jones*, the Eleventh Circuit itself dispensed with that notice when doing so could be described as "harmless error." *See Capuano v. United States*, 955 F.2d 1427 (11th Cir. 1992).

A review of these cases shows that most, of not all, of the circuits dispense with the notice required by Rule 56 when the party opposing the summary judgment cannot show that evidence supporting his position was excluded by the district court. Whatever the terms by which they have done so, the substance of their positions is the same as the Ninth Circuit's requirement of a "full and fair opportunity to ventilate the issues involved." *See United States v. Grayson*, 879 F.2d 620 (9th Cir. 1989). Thus, the Ninth Circuit is not nearly so extreme as suggested by Thompson, and the so-called "unnecessary and intolerable" conflict among the circuits exists, at worst, only on paper in the choice of words. Resolving such a chimerical conflict is hardly worth the time of this Court.

### C. Attempting To Decide This Case Will Inevitably Involve The Court In Deciding Questions Of Fact Rather Than Issues Of Law.

In the proceedings below, as explained in Section A of the argument, it was easier and more practical to assume, without actually deciding, that the judgment entered by the district court was done *sua sponte*. for that reason, the Court will not have the benefit of any findings

of fact on, or analysis of, this issue by either the district court or Ninth Circuit Court of Appeals. To address Thompson's argument, the Court will have to analyze a lengthy record to decide the preliminary question of whether the summary judgment of May 4, 1993 was entered *sua sponte*. In so doing, it will have to be its own finder of fact.

Moreover, for the reasons explained in Section B of the argument, Thompson should be required to make some showing of prejudice, *i.e.*, issues of fact that were overlooked by the district court and that could lead to a different result. Otherwise, this Court will find itself addressing a question that is of no practical consequence whatsoever, because in the absence of prejudice, there is only harmless error or a pointless remand. Pumphrey doubts that certiorari is granted for those purposes.

Whether Thompson can point to some evidence that the district court failed to consider was a question that both the district court and the Ninth Circuit evaluated very carefully. Thompson's present complaints to the contrary, *see* p. 16 of the Petition, neither court found a scrap of evidence that the district court had overlooked in its original decision. *See* pp. 5a and 14a of the Petition.

In this Petition, Thompson essentially requests this Court to reanalyze a record that has already been studied by the Ninth Circuit Court of Appeals and the district court to find something that they failed to consider in deciding this case in Pumphrey's favor. This Court usually does not grant certiorari to review evidence and discuss factual issues. *United States v. Johnson*, 260 U.S. 220, 227 (1925).

### D. Viewed In Context Of The Record And The Slight Differences Among The Circuit Courts Of Appeal, This Case Is Not Worthy Of Certiorari.

Rule 10 of the Rules of the Supreme Court declares the petitions for certiorari are granted only for compelling reasons to address important issues of law. Such issues do not arise from peculiar factual circumstances that are not likely to recur. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955).

As noted in Section B of this Memorandum, Thompson has not identified a single case that is comparable to the case at bar on its facts. It is therefore evident that any decision by the Court in this case would be of limited precedential value to the district courts and circuit courts. This is particularly true in light of the factual issues described in Section C. Those questions show that any decision by this Court would be limited virtually to the facts, *i.e.*, whether the district court's judgment was really *sua sponte* and whether Thompson has shown any prejudice on the facts.

Moreover, even if the peculiar circumstances of this case are assumed away, Thompson has not offered anything more than its own say-so to explain why the issues raised by the Petition should be decided by this Court. The positions of the different circuits are remarkably uniform, and the case-by-case approach to which they have gravitated is a sensible one. In short, no one needs a definitive ruling by this Court. Without such a need, there is no compelling reason to grant certiorari.

## CONCLUSION

Certiorari should be denied.

Respectfully submitted this 31 day of January 1996.

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